HAROLD AHMASUK, ET AL.

IBLA 86-303, etc. Decided February 27, 1987

Appeals from decisions of the Fairbanks District Office, Bureau of Land Management, rejecting appellants' Native allotment applications. F-12292, etc.

Affirmed.

1. Alaska: Native Allotments -- Withdrawals and Reservations: Revocation and Restoration

Land withdrawn as a military reservation and subsequently returned by Executive order to the jurisdiction of the Department of the Interior for disposition under the authority of the Act of July 5, 1884, ch. 214, 23 Stat. 103, is not thereby restored to the operation of the public land laws generally. Such land is not vacant, unappropriated, and unreserved, and, hence, a Native allotment application filed for such land alleging use and occupancy commencing after the date of the withdrawal is properly rejected.

APPEARANCES: Tred R. Eyerly, Esq., Anchorage, Alaska, for Native allotment appellants; John E. Garrison, for Sitnasuak Native Corporation; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Harold Ahmasuk and others 1/ have appealed from eighteen separate decisions dated December 12, 1985, of the Fairbanks District Office, Bureau of Land Management (BLM), which rejected their individual Native allotment applications on the ground that the lands applied for were not open to initiation of Native allotment claims at the time appellants commenced use and

1/ For a list of appellants' names and IBLA docket numbers, see the table appended to this opinion.

occupancy of the lands. In addition, the Sitnasuak Native Corporation, which has filed a village selection application for the lands in question under section 12 of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1611 (1982), has filed a notice of appeal objecting to the decision.2/

Each of the individual appellants filed Native allotment claims under the provisions of the Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 3/ The size of the allotments vary from under one-half acre to over 10 acres. Each of the parcels is located in the vicinity of Nome, Alaska, near the mouth of the Nome River in an area known as Fort Davis and within protracted (unsurveyed) secs. 4 and 5, T. 12 S., R. 33 W., Kateel River Meridian. Because appellants' allotment applications were rejected for the same reasons and present the same issues for resolution, the appeals have been consolidated for review.

Fort Davis was established as a military reservation at the turn of the century. On December 8, 1900, President William McKinley signed an unnumbered Executive order approving a request of the Secretary of War, Elihu Root, that certain lands "near the mouth of the Nome River" be reserved for military purposes.

On November 4, 1921, President Warren G. Harding signed Exec. Order No. 3574, which provided that the Fort Davis military reservation, "having become useless for military purposes, the same is hereby placed under the control of the Secretary of the Interior under the Act of July 5, 1884 (23 Stat. L., 103) for disposition as provided therein or as may be otherwise provided by law." The Act of July 5, 1884, referred to in Exec. Order No. 3574 provided for the disposition of "abandoned and useless military reservations" and will be discussed below in further detail.

The third document affecting the status of the lands at issue in this appeal is Public Land Order No. (PLO) 1712, issued on August 7, 1958. This PLO provided in pertinent part:

> 1. The Executive Order of December 8, 1900 * * * is hereby revoked * * *.
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> * * * * * * *
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> 3. Executive Order No. 3574 of November 4, 1921, placing the lands described in paragraph 1 (b) of this order under

2/ Sitnasuak contends it stands to be adversely affected if the lands embraced in the Native allotment applications are patented to it by BLM and it is required to recognize valid existing rights in appellants pursuant to section 14(c)(1) of ANCSA. 43 U.S.C. § 1613(c)(1) (1982).

3/ The Native Allotment Act of 1906 was repealed by section 18 of the Alaska Native Claims Settlement Act of 1971 (ANCSA) with a savings provision permitting allotment applications pending on ANCSA's date of passage (Dec. 18, 1971) to be considered for approval under the Native Allotment Act. 43 U.S.C. § 1617(a) (1982).

> control of the Secretary of the Interior for disposal under the act of July 5, 1884 (23 Stat. L 103) or as might otherwise be provided by law, and Executive Order No. 7049 of May 21, 1935, so far as it placed lands comprising the Post Cemetery at Fort Davis, under control of the Secretary of the Interior for disposition under said act or as might be otherwise provided by law, are hereby revoked.
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> 5. The lands shall not be subject to any other form of use or disposal under the public land laws, unless and until a further order is issued by an authorized officer of the Bureau of Land Management.
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> * * * * * * *

The terms of PLO 1712 further explained that these lands were being withdrawn to provide a preferred right of selection of the Fort Davis land by the Territory of Alaska under section 202(b) of the Act of July 28, 1956, P.L. 84-830, 70 Stat. 709, 711. It appears from the record no selection of the lands by the Territory or State of Alaska was approved. The lands were subsequently withdrawn for selection and were selected by the Sitnasuak Native Corporation under section 12 of ANCSA, 43 U.S.C. § 1611 (1982).

Based on this background, BLM found that the lands upon which appellants' allotment claims were located had been withdrawn from the public domain since the 1900 military reservation establishing Fort Davis. Since Native allotment applications are restricted to "vacant, unappropriated and unreserved" lands, BLM rejected the applications on the well established principle that a Native allotment application is properly rejected where it is clear from the record that use and occupancy was initiated at a time when the land was withdrawn. See, e.g., Stanislaus Mike, 56 IBLA 69, 72 (1981). 4/

Appellants contest the BLM findings contending Exec. Order No. 3574 effectively revoked the 1900 military reservation in 1921 and opened the lands for entry under the Native Allotment Act. Appellants acknowledge that the lands were not subject to entry by Natives prior to Exec. Order No. 3574, and that, in 1958, PLO No. 1712 again withdrew the land from entry. They argue, however, that the language of Exec. Order No. 3574 opened the land from 1921 to 1958, thus creating a window between the two withdrawals when the lands at issue were vacant, unappropriated, and

4/ Although certain Native allotment applications pending before the Department on or before Dec. 18, 1971, were statutorily approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), enacted Dec. 2, 1980, this statutory approval did not extend to applications describing lands which were reserved on Dec. 13, 1968. 43 U.S.C. § 1634(a)(1) (1982).

unreserved. 5/ Resolution of the issue requires analysis of the Executive orders withdrawing the land for a military reservation and restoring the land to the jurisdiction of the Department of the Interior, as well as the Act of July 5, 1884, and their effect on the status of the land.

Because it is central to appellants' claims, we begin with an in-depth review of Exec. Order No. 3574. The order reads in full:

> The military reservation at Fort Davis, Alaska, set apart for military purposes by Executive Order dated December 8, 1900, having become useless for military purposes, the same is hereby placed under the control of the Secretary of the Interior under the Act of July 5, 1884 (23 Stat. L., 103) for disposition as provided therein or as may be otherwise provided by law.
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> This reservation contains an area of 148.68 acres, more or less, and is situated at the mouth of the Nome River about three and one-half miles from Nome, Alaska.

The Act of July 5, 1884, ch. 214, 23 Stat. 103, 6/ referred to in the order, provided in pertinent part:

> That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or heretoafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.
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> Sec. 2. That the Secretary of the Interior may, if in his opinion the public interests so require, cause the said lands, or any part thereof, in such reservations, to be regularly surveyed * * *. He shall cause the said lands so surveyed * * * to be appraised * * * and when the appraisement has been approved he shall cause the said lands * * * to be sold at public sale, to the highest bidder for cash, at not less than the appraised value thereof, nor less than one dollar and twenty-five cents per acre,

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5/ The date when appellants commenced use and occupancy of the lands described in their Native allotment applications is not directly at issue in this appeal. While none of the appellants commenced occupancy prior to the military reservation of 1900, the majority have claimed occupancy prior to 1958. The issue of whether use and occupancy commenced prior to 1958 was not addressed by BLM and we find it appropriate to base our decision on the threshold issue which we find dispositive of all these appeals, i.e., whether the land was open after Exec. Order No. 3574 in 1921.

6/ Sections 1, 2, and 3 of the Act of July 5, 1884, were repealed by section 1(114) of the Act of October 31, 1951 ch. 654, 65 Stat. 701, 706. Section 5 was repealed by section 703(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2789, 2790.

> first having given not less than sixty days' public notice of the time, place, and terms of sale, * * * and any lands * * * remaining unsold may be reoffered for sale at any subsequent time in the same manner at the discretion of the Secretary of the Interior; and if not sold at such second offering for want of bidders, then the Secretary of the Interior may sell the same at private sale for cash, at not less than the appraised value, nor less than one dollar and twenty-five cents per acre: Provided, that any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation * * * in good faith for the purpose of securing a home and of entering the same under the general laws and has continued in such occupation to the present time, and is by law entitled to make a homestead entry shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the Government surveys and subdivisions * * *.
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> * * * * * * *
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> Sec. 5. Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States.

Although it seems clear Exec. Order No. 3574 by its terms terminated the military reservation and returned the land to the jurisdiction of the Secretary of the Interior for disposition as authorized by the Act of July 5, 1884, the question remains whether the land was also thereby opened to application and entry generally under the public land law, including occupancy under the Native Allotment Act.

Appellants seize upon the words in the Executive order stating the land is "placed under control of the Secretary of the Interior under the Act of July 5, 1884 * * * for disposition as provided therein or as may be otherwise provided by law." (Emphasis added.) Appellants argue this language itself served to open the land to use and occupancy under the other public land laws as well as the Act of July 5, 1884.

The Solicitor, on behalf of BLM, argues Exec. Order No. 3574 did not restore these public lands generally to entry. The Solicitor has cited Walsh v. Ford, 1 Alaska 146, 150-52 (1901), rejecting any preference right of a settler for occupancy on such land after the date of the military withdrawal and holding that pursuant to an Executive order releasing lands from a military reservation for disposition under the Act of July 5, 1884, any subsequent occupant has only the same right as others to purchase the land by bid at public sale after appraisal. The BLM brief also cites an opinion of the Attorney General to the effect that the Act of July 5, 1884, provides the exclusive means of disposing of land withdrawn for a military reservation which is no longer needed for military purposes. 28 Op. Att'y Gen. 143, 144-45 (1910).

[1] Guiding our consideration of the effect of Exec. Order No. 3574 are Departmental and judicial precedents regarding restoration of public lands formerly withdrawn, as a general matter, and restoration of lands

formerly withdrawn for a military reservation and returned to the jurisdiction of the Secretary of the Interior pursuant to the Act of July 5, 1884, in particular.

In ruling on an application for agricultural entry filed on land withdrawn for a railroad grant where the selection by the railroad was subsequently relinquished, Assistant Secretary Chapman set forth the distinction between restoration of lands formerly withdrawn, reserved, or embraced in a relinquished application and the opening of such lands for disposal in Earl Crecelouis Hall, 58 I.D. 557 (1943):

> The simple fact that lands belong to the United States and make part of the public domain does not of itself make them subject to disposal and private acquisition. Something more is required. * * * [T]he Supreme Court has also said that before lands federally owned become subject to private appropriation there must be an indication by the United States that the lands are held for such disposal. 4/
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> This latter statement, made in 1898, epitomized land department views and practice, in particular as to "restored" lands. Through the years, the Office and the Department have had frequent occasion to consider the status of restored lands, -- lands once segregated by various kinds of adverse claims or appropriations, even those of patent, and restored to the United States by congressional act, by court decision, by individual relinquishment, by land office cancellation or by revocation of some withdrawal, Executive or departmental. In a long line of decisions in such cases, the Department has held that although restored lands become part of the public domain immediately, it remains for the Department and it alone in the absence of congressional direction to give the "indication" spoken of by the [C]ourt and to determine when and how such lands shall be opened for disposal. 5/ [Emphasis added.]
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> Not only this. The Department has also held that orderly administration of the land laws forbids any departure from the salutary rule that lands which have once been segregated from the public domain, whether by entry, patent, reservation, selection or otherwise, shall not be subject to any form of appropriation until the local land officers * * * shall have entered upon the records of the local office proper notation of the restoration of the lands to the public domain. 6/

4/ Oklahoma v. Texas, 258 U.S. 574, 600.
5/ Olson v. Traver, 26 L.D. 350, 354, 355 (March 10, 1898); Smith v. Malone, 18 L.D. 482, 483; and the Omaha Railway cases therein cited; Charles H. Moore, 27 L.D. 481, 493; State of Utah, 53 I.D. 365, 367; Asst. Attorney General's Opinion of September 14, 1904, 33 L.D. 236.
6/ Gunderson v. N.P. Ry. Co., 37 L.D. 115; Holt v. Murphy, 207 U.S. 407, 415; Germania Iron Co. v. James, 89 Fed. 811; Hiram M. Hamilton, 38 L.D. 597; California and Oregon Land Co. v. Hulen and Hunnicutt, 46 L.D. 55; Lewis G. Norton (On Rehearing), 48 L.D. 507.

58 I.D. at 560; see Petro Leasco, Inc., 42 IBLA 345 (1979).

Appellants state that they "do not dispute the general principle of public land law holding that until a withdrawal order is revoked and the land restored to entry by an opening order, such land is not subject to appropriation or disposal" (Statement of Reasons (SOR) at 7). They argue, however, that after Exec. Order No. 3574 found the Fort Davis Lands to be useless for military purposes, the order opened the land "for disposal under not only the Act of July 5, 1884, but also pursuant to other public land law programs" (SOR at 4). They base this argument on the language of Exec. Order No. 3574, which authorized the Secretary to dispose of the lands "as provided [in the Act of July 5, 1884] or as may be otherwise provided by law."

Notwithstanding the language of Exec. Order No. 3574 returning the lands to the jurisdiction of the Secretary of the Interior for disposition under the Act of July 5, 1884, or as "may be otherwise provided by law," further action was clearly contemplated prior to disposition of the land. This might take the form of either survey and appraisal of such lands and advertising them for competitive sale as authorized by the Act of July 5, 1884, or some subsequent legislative action authorizing other disposal of the lands. Lands "reserved for military purposes can not be restored to the public domain without an Act of Congress." 28 Op. Att'y Gen. 143, 144 (1910). The Act of July 5, 1884, provided the authority for disposal of this land in the abandoned Fort Davis military reservation. Subsequent passage of the Act of July 28, 1956, authorizing selections by the Territory of Alaska, provided the authority for PLO 1712 making the land available for selection. Still later the land was withdrawn for Native village selection pursuant to ANCSA in 1971. Thus, it is clear there has been no action taken by the Department or by Congress opening the land prior to PLO No. 1712 in 1958 making the land available for selection by the Territory of Alaska and enactment of ANCSA in 1971 making the land available for Native village selection. 43 U.S.C. § 1611 (1982).

The precedents cited by appellants do not support a contrary result. In Instructions, 43 L.D. 33 (1914), the First Assistant Secretary had occasion to rule on the availability of land withdrawn as part of the Mt. Whitney military reservation and subsequently returned by Executive order of February 2, 1904, to the jurisdiction of the Interior Department for disposition under the Act of July 5, 1884. In holding that the intent of Congress in passing the Act of June 11, 1906, ch. 3074, 34 Stat. 233, opening lands chiefly valuable for agriculture situated within national forests to occupation and entry, was to open those lands withdrawn for national forest purposes regardless of their prior status, the conclusion was predicated on a finding that:

> It is true that the act of July 5, 1884, provides a specific method for the disposal of lands within the limits of abandoned military reservations, which method includes appraisal and sale, at not less than the appraised value, a method inconsistent with disposition under the so-called free homestead law. * * * However, under section 24 of the act of March 3, 1891 (26 Stat. 1095), the President is authorized to "set apart and reserve, in any State or Territory having public lands bearing forests, in any

> part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations," and this Department and the courts have held that under this authority he may withdraw lands in the public domain whether they be disposable under the general land laws or under some special and limited method. The case of United States v. Blendaur [128 F. 910 (9th Cir. 1904)] involved lands which it was contended were not "public lands" but had been previously set apart for a special purpose, but the court held that the land was a part of the public domain and was public land of the United States within the intent and meaning of those words as used in the act of March 3, 1891, and when included in a national forest became a part thereof subject to administration and use as such. That this is correct would appear to require no extended argument. [Emphasis added.]

43 L.D. at 35-36. Thus, the opinion clearly held restored land may qualify as public lands for purposes of subsequent withdrawal for national forest purposes and disposal pursuant to statutory authority as national forest lands chiefly valuable for agricultural purposes notwithstanding the fact these lands were not otherwise disposable under the general land laws. In the context of the appeals before us, the authority for disposal came in the form of the 1958 withdrawal under PLO 1712 for selection by the Territory of Alaska pursuant to the Act of July 28, 1956, and, subsequently, withdrawal for selection under ANCSA. 43 U.S.C. § 1610(a) (1982).

The case of United States v. Delta Development Co., 322 F. Supp. 121 (E.D. La. 1970), does not, on close examination, support appellants' contention. The court recognized that when abandonment of the military reservation in that case occurred, the land "again became part of the public lands of the United States and was subject to disposition under any of the general land laws enacted after that date." Id. at 129. (Emphasis added.) In Delta the parcel of land was in fact sold and patented under the terms of the Act of July 5, 1884. Section 5 of that Act, quoted previously, stated that mineral lands in abandoned military reservations shall be disposed of "exclusively under the mineral land laws of the United States." The land at issue was determined to be valuable for minerals prior to patent. The court rejected Delta's claim that the land patent under the Act of July 5, 1884, should be construed as free of a mineral reservation, recognizing the lack of authority for sale of mineral lands under the nonmineral land laws prior to the Act of July 17, 1914, as amended, 30 U.S.C. §§ 121-123 (1982). The ruling in Delta upheld the applicability of the Act of July 17, 1914, authorizing the sale of lands valuable for certain mineral deposits, if otherwise available under the nonmineral land laws, subject to a reservation of the minerals to the United States.

Accordingly, we are unable to find that the lands at issue have been available for initiation of use and occupancy under the Alaska Native Allotment Act since 1900.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge